U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date: September 28,1 998

Case No: 97 INA 306

In the Matter of:

ENSENADA GUEST HOME, Employer

on behalf of

LUIS ALLEN C. DALISAY, Alien.

Appearances: T. C. Gallavan, Esq., of San Jose, California.

Before: Huddleston, Lawson, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of LUIS ALLEN C. DALISAY (Alien) filed by ENSENADA GUEST HOME[1] (Employer), pursuant to § 212(a)(14)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(14) (A) (the Act), and regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U. S. Department of Labor at Philadelphia, Pennsylvania, denied this application, the Employer requested review pursuant to 20 CFR § 656.26.[2]

Statutory authority. An alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa, if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient U. S. workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform

[1]The owner of the Employer was Lazarina Molo at the time the application was filed. On May 20, 1996, Norma Solidum attested that she was now the new owner of the Employer and replaced Ms. Molo.

[2]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the Appeal File (AF), and written arguments of the parties. 20 CFR § 656.27(c).

such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U. S. workers similarly employed. See 8 U.S.C. § 1182(a)(14)(A). An employer desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. Such requirements include the responsibility of employer to recruit U. S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U. S. worker availability at that time and place.[3]

STATEMENT OF THE CASE

On February 17, 1994, the Employer applied for labor certification to enable the Alien, a national of the Philippines, to fill the job of "Practical Nurse" in its residential care home for developmentally-disabled. AF 42-44. The position was classified under the DOT Occupational Title of "Nurse Assistant, No. 355.674-014.[4] Employer described the job as follows:

> Clean rooms (12); prepare and serve meals; wash-dry-iron clothes and linens; handwash soft clothes; monitor activities of six developmentally-disabled, incontinent-adults, ages 18-59; wash dishes; assist with bed bath, shower, sponge bath, tub bath; ambulating, exercising, shaving, hair care, assist with medications; provide oral care, bowel care, skin care; vacuum; change bed linens; straighten rooms; change diapers; document progress of clients.

AG 42. This is a live-in position, for which Employer offered a salary of $1,000 per month based on a forty hour week from 3:00 PM to 12:00 AM.[5] The educational requirement was completion of high school and the Employer required three years of experience in the Job Offered or in the Related Occupation as a caregiver. The Other Special Requirements were the following: "Must speak and write English fluently. Must have legal right to work if hired. Must have First Aid, CPR, Health Screening report. Must be

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[3]Administrative notice is taken of the Dictionary of Occupational Titles, ("DOT") published by the Employment and Training Administration of the U. S. Department of Labor.

[4]**355.674-014 NURSE ASSISTANT** (medical ser.) alternate titles: nurse aide. Performs any combination of following duties in care of patients in hospital, nursing home, or other medical facility, under direction of nursing and medical staff: Answers signal lights, bells, or intercom system to determine patients' needs. Bathes, dresses, and undresses patients. Serves and collects food trays and feeds patients requiring help. Transports patients, using wheelchair or wheeled cart, or assists patients to walk. Drapes patients for examinations and treatments, and remains with patients, performing such duties as holding instruments and adjusting lights. Turns and repositions bedfast patients, alone or with assistance, to prevent bedsores. Changes bed linens, runs errands, directs visitors, and answers telephone. Takes and records temperature, blood pressure, pulse and respiration rates, and food and fluid intake and output, as directed. Cleans, sterilizes, stores, prepares, and issues dressing packs, treatment trays, and other supplies. Dusts and cleans patients' rooms. May be assigned to specific area of hospital, nursing home, or medical facility. May assist nursing staff in care of geriatric patients and be designated Geriatric Nurse Assistant (medical ser.). May assist in providing medical treatment and personal care to patients in private home settings and be designated Home Health Aide (medical ser.). GOE: 10.03.02 STRENGTH: M GED: R3 M2 L2 SVP: 4 DLU: 89

[5]The job duties and the live-in agreement are confirmed by the copy of the contract between the Employer and the Alien.

willing to be fingerprinted to be sent to the Department of Justice." *Id*. The Employer's recruitment effort produced two responding job applicants, neither of whom was hired. AF 41.

Notice of Findings. On April 19, 1996, the Certifying Officer issued a Notice of Findings (NOF), citing 20 CFR §§ 656.21(b)(2)(ii), 656.21(b)(5), and 656.24(b)(2)(ii), and advising the Employer that certification would be denied, subject to rebuttal. AF 36-40. (1) The CO found that the job duties stated in the Application do not appear in any single DOT job description and were inconsistent with 20 CFR § 656.21(b)(2)(ii). The CO explained that the position, as offered, combined the job duties of a Nurse Assistant under DOT Occupational Code No. 355.674-014, and the work of a House Worker, General under DOT Occupational Code No. 301.474-010.[6] The CO said that Employer's Job Duties fitted the description of a combination position under the BALCA holding in **H. Stern Jewelers, Inc.**, 88 INA 421 (May 23, 1990). Rejecting the explanation in the Employer's application, the CO said that it failed to proved it has normally employed workers to perform this combination of duties and that workers customarily perform this combination of duties in the area of intended employment, or that this combination of duties results from its business necessity. In its Rebuttal Employer was directed to revise these job duties by eliminating the combination of duties, or, by way of an alternative, to justify this combination of duties and prove such employment to be normal or customary. (2) The CO also found that at least one U. S. applicant, Ms. Fonseca, was qualified for the position by education, training, experience, or a combination thereof and was able to perform in the normally accepted manner the duties of the occupation as customarily performed by other U. S. workers similarly employed. Employer rejected this applicant because her experience with frail elderly persons was "substantially dissimilar to the duties of a caregiver for the developmentally-disabled, who are inactive [and] inert, and who cannot function at all." This critical assertion, said the CO was explicitly contradicted by Employer's own photographs showing its patients sitting and eating and engaging in behavior that was clearly inconsistent with their being "inert" and unable to "function at all." AF 38. Moreover, said the CO, the Employer apparently rejected Ms. Fonseca as unqualified based solely on its review of her resume and without interviewing or investigating her qualifications, which was inconsistent with its obligation to recruit for this position in good faith.

(3) Finally, the CO observed that the Alien had worked full time as a caregiver for Sonia Dalisay, an apparent family member, from 1988 to 1993 while earning a baccalaureate degree in Science with a major in Electrical Engineering. AF 97-98. Questioning whether the Alien's at home services for a family member was qualifying experience, the CO inferred that she did not meet Employer's minimum requirements at the time she was hired. Consequently, the CO directed the Employer either to validate or

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[6] **301.474-010 HOUSE WORKER, GENERAL** (domestic ser.) alternate titles: housekeeper, home Performs any combination of following duties to maintain private home clean and orderly, to cook and serve meals, and to render personal services to family members: Plans meals and purchases foodstuffs and household supplies. Prepares and cooks vegetables, meats, and other foods according to employer's instructions or following own methods. Serves meals and refreshments. Washes dishes and cleans silverware. Oversees activities of children, assisting them in dressing and bathing. Cleans furnishings, floors, and windows, using vacuum cleaner, mops, broom, cloths, and cleaning solutions. Changes linens and makes beds. Washes linens and other garments by hand or machine, and mends and irons clothing, linens, and other household articles, using hand iron or electric ironer. Answers telephone and doorbell. Feeds pets. GOE: 05.12.18 STRENGTH: M GED: R3 M2 L2 SVP: 3 DLU: 86

to delete this experience requirement and retest the labor market, or explain why it was not feasible to hire an applicant with less than the experience it said was needed. 20 CFR §§ 656.20(c)(8), 656.21(b)(6)

Rebuttal. On May 23, 1996, the Employer filed a Rebuttal to address the issues raised in the NOF. *Inter alia*, the Employer conceded that the pictures CO mentioned did show some of its patients feeding themselves, narrowing the scope of its reasons for rejecting Ms. Fonseca. AF 29. The Rebuttal also included the Alien's unsworn statement about working as "a caregiver" for Sonia Dalisay while attending college in Manila at a location one hour away from the patient's home. AF 30, 34. Another document meant to amend the Form ETA 750B served to confirm that the Alien worked forty hours a week as "Caregiver" in the private home of Ms. Dalisay from March 1988 to October 1993, and that from December 1993 to the time this application was filed the Alien worked for the Employer as a "Caregiver," performing similar duties for the inmates of this home. AF 32.

Final Determination. The CO's Final Determination denying certification was issued July 18, 1996. AF 16-21. After fully considering the Employer's rebuttal, the CO found that the Employer had failed to disprove the regulatory violations that were discussed in the NOF. (1) The combination of the duties of a Nurse Assistant and House Worker that is regulated by 20 CFR § 656.21(b)(2)(ii) was not shown to be customary or normal in the area of intended employment by the statement of the Employer's current owner. Ms. Solidum contended that, "[T]he amount of time to be spent on the duties does not financially justify the hiring of a separate individual for each function alone. ..." She added that the operational revenues of the business are not sufficient to pay for two full time employees to perform such duties. The CO then found the owner's mere assertions insufficient to establish either that it normally employed workers to perform this combination of duties, that workers customarily perform this combination of duties in the area where it is located, or that the combination of duties results from business necessity under 20 CFR § 656.21(b)(2)(ii).[7] (2) In determining whether the Employer acted in good faith in testing the U. S. labor market under the Act, the CO weighed evidence under 20 CFR §§ 656.21(b)(5), 656.21(b)(6), and 656.24(b)(2)(ii). First, the CO noted that the Employer rejected Ms Fonseca because her experience was in working as a caregiver for frail elderly patients, while it needed a person whose experience was with developmentally disabled inmates, observing that Employer's own evidence contradicted that contention. While Employer said Ms. Fonseca did not have experience in housekeeping, meal preparation, menu planning, and laundry work, the CO explained that this U. S. applicant was qualified by sufficient experience in food service because of her experience restaurant work. The CO concluded that (1) Ms. Fonseca was qualified by evidence the Employer could have gotten by interviewing this candidate, and (2) such skills as the Employer cites as lacking could be learned quickly through on the job training.[8] Observing that 20 CFR § 656.24(b)(2)(ii) requires that a U. S. worker considered able and

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[7]The new owner's statement that the operational revenues of the business are not sufficient to pay for two full time employees to perform such duties has also been considered in support of Employer's proof of business necessity under 20 CFR § 656.21(b)(2)(ii). It is well established that an assertion that a combination of duties would produce financial savings for the employer does not establish business necessity. **Chinese Community Center, Inc.**, 90 INA 099 (Jun. 4, 1991). For this reason the CO was correct in finding that this contention was not meritorious.

[8]The CO cited "California State Regulations, Title 22, Division 6, Chapter 8(c)" in stating this conclusion. See AF 19.

qualified for the position if by a combination of education, training, and experience the job applicant is able to perform in the occupation as it customarily is performed by other U. S. workers similarly employed, the CO concluded that Ms. Fonseca was qualified for this job within the meaning of the Act and regulations and that the Employer's hiring criteria for this job were unduly restrictive and that the job was clearly open to any qualified U. S. worker.

In addition, the CO found that the Employer had failed to establish that the Alien's services to a member of her family while attending college were supported by sufficient evidence to prove that an employer/employee relationship existed to support her claim of experience as a caregiver. Noting that the Employer was required to sustain the burden of proving this fact, the CO quoted § 291 of the Act:

> Whenever any person makes application for a visa or any other document required for entry, or makes application for admission, or otherwise attempts to enter the U. S., the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document or is not subject to any exclusion under any provision of this Act.

8 U.S.C. 1361. For these reasons the CO concluded that the Employer had failed to demonstrate that the hiring criteria stated in this application represented its actual minimum requirements for this position under 20 CFR §§ 656.21(b)(5), 656.21(b)(6). **Capriccio's Restaurant**, 90 INA 480(Jan. 7, 1992).

Appeal. On August 22, 1996, the Employer appealed to BALCA. The Employer's appeal included a letter-brief responding to the findings of the CO in the Final Determination. AF 02-03. The Employer transmitted new evidence as to the combination of duties that the Board cannot consider under 20 CFR § 656.26(b)(4). See **University of Texas at San Antonio**, 88 INA 071 (May 9, 1988) As to the issues relating to the qualifications of Ms. Fonseca and the requirement that the job be offered at the level of the Employer's minimum requirements, the Employer requested that BALCA reconsider (1) its explanation for the rejection of Ms. Fonseca and (2) the Alien's explanation of the inability to document the work experience as "an uncertified nurse assistant" for Ms. Dalisay.[9]

Discussion

The Notice of Finding is required to give notice that is adequate to provide an opportunity for the employer to rebut or cure the defects found. **Downey Orthopedic Medical Group**, 887 INA 674(Mar. 16, 1988)(*en banc*). This NOF clearly stated the deficiencies in the documentation supporting this Employer's application, and itemized the detailed proof their rebuttal required.
The central issue concerns the Employer's implementation of the hiring criteria encompassed by the Experience criterion in recruiting for this job under the Act and regulations. The CO concluded that the

[9]Here the Employer used the male pronoun in referring to the Alien. At other points this record used the female pronoun in the same context. At no point has the gender of Luis Allen C. Dalisay been indicated. It would have been helpful to know this fact in view of the personal nature of the physical contact between the "caregiver" and the patients being nursed or the Home inmates being given aid in this case.

Employer stated the Job Duties for this position as a combination of the duties of a Nurse Assistant and House Worker as these two occupations are defined by the DOT. The Employer was told to furnish evidence that it had employed other workers to perform these combined duties in the past or that the combined duties were customary or normal in the area of intended employment. In the alternative, the CO allowed the Employer either to amend its statement of Job Duties or to prove the business necessity of this combination of functions. **Gencorp**, 87 INA 659 Jan. 13, 1988)(*en banc*).

The Employer's rebuttal and its belated filing of further evidence after the Final Determination clearly indicate that it understood the nature of the defect and of the proof that it was required to proffer by way of rebuttal. The Employer failed to present sufficient evidence to rebut the CO's inference that the Employer's application and advertisement misstated the work of this job in violation of 20 CFR § 656.21(b)(2)(ii), however. For these reasons the panel agrees with the CO's conclusion that the Employer's Job Duties were unduly restrictive within the meaning of 20 CFR 656.21(b)(2) after considering the Rebuttal and Employer's brief with the entire record. While the panel has not addressed CO's further findings in detail, we have affirmed the CO's finding that Employer's hiring criteria were unduly restrictive. It follows that the Employer's use of such criteria in the hiring process foreclosed any possibility that it could demonstrate that it rejected the well qualified U. S. workers discussed in the NOF and Final Determination for reasons that were lawful and job related.

Consequently, we conclude that there was sufficient evidence to support the CO's finding that the Employer failed to prove that its job requirements were not unduly restrictive within the meaning of 20 CFR 656.21(b)(2) and that the Certifying Officer's denial of alien labor certification should be affirmed.

Accordingly, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the Panel.

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.